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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CC B/CPD File No. 98-63
	)	
Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

REPLY OF NETWORK ACCESS SOLUTIONS TO OPPOSITIONS

No commenter challenges NAS's core contention that the FCC acted arbitrarily and capriciously in setting the trigger at 15 percent for Phase 1 transport pricing relief.[1] Agency action is arbitrary and capricious unless the agency articulates "a rational connection between the data found and the choice made."[2] The FCC failed to articulate a rational explanation for why its choice of a 15 percent trigger satisfies its goal of ensuring sufficient competitive entry to deter predatory

1. In addressing NAS's contention, SBC and BellSouth argue that the use of collocation as a proxy for competitive entry is well supported in the record. Comments of SBC at 2-3; Comments of BellSouth at 2. However, NAS does not take issue with the choice of a proxy. It takes issue with the choice of the trigger level of this proxy. On this issue, SBC and BellSouth are silent.

2. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An adequate explanation of the basis and purpose of an agency's rules is also a basic requirement of the Administrative Procedure Act. *See ILGWU v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), interpreting Section 4(b) of the APA, 5 U.S.C. § 553(c).

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pricing. While the Commission recited some data regarding the level of collocations and fiber deployment in Norfolk, it made no attempt to relate that data to its stated goal. On reconsideration, the Commission must perform an analysis of the level of sunk investment necessary to prevent predatory pricing, as well as the relationship between sunk investment and its proxy, the breadth of central office collocations. NAS believes that the evidence shows that Phase 1 triggers of 30 percent for high capacity transport and 50 percent for low capacity transport are necessary to achieve the Commission's goal of ensuring that the market for transport is free from predatory pricing assuming Phase 1 pricing relief.

Moreover, although Bell Atlantic opposes the Phase 1 triggers for transport that NAS proposed on the ground that their adoption "may make it impossible" to gain Phase 1 relief since more than 40 percent of Bell Atlantic's wire centers have very little transport demand,[3] this fact, even if true, is irrelevant. The fact that more than 40 percent of Bell Atlantic wire centers may have very little transport demand is irrelevant since it is likely that most wire centers with no such demand are *outside* of MSAs whereas the Phase I triggers apply only in MSAs.

ILECs also oppose the NAS recommendation that the Commission subject low-capacity transport to the higher Phase I trigger applicable to end-user channel terminations rather than high-capacity transport on the ground that its adoption would "add a needless layer of complexity" to the Commission's two-segment scheme.[4] But their opposition on this basis is misplaced. Different triggers would apply to just two market segments under both the NAS proposal and the FCC's initial order. Under the NAS proposal, one segment would consist of central office channel terminations

3. Bell Atlantic Opposition at 3.

4. Bell Atlantic Opposition at 5; Comments of SBC at 3; Comments of U S West at 8-9.

and high-capacity transport (DS3 and higher) and the other would consist of end-user channel terminations and low-capacity transport (below DS3). Under the FCC's initial order, one segment would consist of central office channel terminations and all transport and the other would consist of end-user channel terminations.

Not only is there no merit in the ILECs' stated reason for opposing the manner in which NAS proposes to divide the market, the two-market segment approach suggested by NAS plainly is more rational than the two-market segment approach adopted in the initial order. The Commission adopted different triggers for two separate market segments because it recognized that demand for certain services (those for which a lower trigger is appropriate) is concentrated in a few central offices, whereas demand for other services (those for which a higher trigger is required) is more geographically dispersed. No one commenting on the NAS proposal disputes the NAS assertion that demand for low-capacity transport is almost as geographically dispersed as demand for end-user channel terminations. For example, CLECs providing DSL service often collocate broadly in the MSAs they serve, and a CLEC's transport in many central offices will be below DS3 capacity until its customer base justifies the use of DS3 capacity.[5] For example, NAS is collocated in 360 central offices in the nine MSAs where it provides CLEC service.

5. Ignoring the use of low-capacity transport by CLECs, ILECs argue that NAS's concerns regarding low-capacity transport are satisfied because ISPs and small businesses, the other two categories of low-capacity transport customers NAS identified, are end users. Comments of BellSouth at 5; Comments of U S West at 3. However, this argument proceeds from an incorrect factual premise. An end user purchasing special access obtains *both* channel terminations *and* transport (often below DS3 capacity). While the end-user channel termination portion of this service will be subject to the higher trigger level, the transport portion of this service could potentially be subject to Phase I relief long before any facilities-based competition is present unless the FCC raises the Phase 1 trigger applicable to low capacity transport.

CONCLUSION

The Commission should revise its order in the manner requested by the NAS petition.

Respectfully submitted,

NETWORK ACCESS SOLUTIONS CORPORATION

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December 13, 1999

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